

# THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BIGFOOT 4x4, INC.,

Opposer,

VS.

BIG O TIRES, INC.,

Applicant.

76576412

Opposition No. 91166074

### APPLICANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

COMES NOW the Applicant, Big O Tires, Inc. [hereinafter "Big O" or "Applicant"], by and through its undersigned counsel, pursuant to Rule 12(b) [or 56] of the Federal Rules of Civil Procedure and TBMP §503 [or §528], and moves the Trademark Trial and Appeal Board ("Board") for an Order dismissing the Notice of Opposition for failure to state a claim, or in the alternative, granting Applicant's Motion for summary judgment.

The parties to this proceeding were party to an infringement lawsuit brought by Big O. After the court entered a preliminary injunction against Bigfoot 4x4, Inc. ("Bigfoot 4x4") and in favor of Big O, the parties agreed to settle the matter and a permanent injunction was entered. Pursuant to the settlement agreement, the parties agreed that Big O would "have the exclusive rights to use the mark 'Big Foot' for: . . 'vehicle replacement parts'." Similarly, the permanent injunction prohibited Bigfoot 4x4 from using the BIG FOOT mark in connection with, *inter alia*, vehicle replacement parts. Notwithstanding the parties agreement and entry of the permanent injunction, Bigfoot 4x4



improperly opposed Big O's application for the BIG FOOT mark in connection with vehicle batteries, a vehicle replacement part.

In short, Opposer has failed to allege facts which demonstrate: 1) any proper statutory ground for opposing Applicant's application, and/or 2) that Opposer enjoys the requisite standing. In further support of the Motion, Applicant states as follows.

#### I. STATEMENT OF UNDISPUTED FACTS

The following facts are relied upon by Applicant for purposes of this Motion only and are not conceded for any other purpose:

#### A. Background of Prior Lawsuit

On February 27, 2001, Big O filed suit against Bigfoot 4x4 (and other parties) for trademark infringement, dilution, false designation, false representation or origin, false advertising, deceptive trade practices and unfair competition in the United States District Court for the District of Colorado. Big O moved for preliminary injunction, which the court granted, after a three day trial. *Big O Tires, Inc. v. Bigfoot 4x4, Inc.*, 167 F. Supp.2d 1216, 1219, 1230-31 (D.Colo 2001). The Court's order and preliminary injunction contained numerous, detailed findings of fact, and, Bigfoot 4x4 was, *inter alia,* "enjoined from directly or indirectly applying, or causing others to apply the trademark 'Bigfoot' to any automotive part or accessory product"; and from "licensing the trademark 'Bigfoot' for any automotive part or accessory product". *Id.*, at 1230-31.

On January 21, 2004, the Court entered a final order and permanent injunction against Opposer Bigfoot 4x4 (the "Permanent Injunction"). *See* Final Order and Permanent Injunction on Consent, United States for the District Court for the District of Colorado, Civil Action No. 01-F-346

(January 21, 2004), attached hereto as Exhibit A. That order, which is final and non-appealable, held that:

Plaintiff Big O is the owner of the trademark BIG FOOT, as well as the design of a "Bigfoot" or Sasquatch character, as exemplified by Exhibit A, hereto, and the design of a "big foot", as exemplified by Exhibit B, hereto, in connection with the following items for vehicles: tires, wheels, tire accessories, wheel accessories, cargo restraints, shock absorbers, struts, suspension parts, and **vehicle replacement parts** [hereafter, collectively referred to as the "Big O BIG FOOT Mark(s)"], and the U.S. registrations therefor, nos. 1,102,058; 1,102,059; 1,904,955; and 2,314,775 [hereafter, the "Big O BIG FOOT Registrations"] (emphasis supplied).

The order also permanently enjoined Opposer Bigfoot 4x4 from, inter alia:

applying, or authorizing or licensing another to apply, the trademark BIG FOOT (alone or in conjunction with any other word, design or symbol, and whether as one word or two) to, and/or from using BIG FOOT (alone or in conjunction with any other word, design or symbol, and whether as one word or two) as a trade name, trademark or service mark for, and/or in connection with, any of the following items for vehicles: . . . (g) vehicle replacement parts.

See Exhibit A, p.2.1

<sup>&</sup>lt;sup>1</sup> The Court's Order also found binding, and enforced, a settlement agreement between Bigfoot 4x4 (Opposer here) and Big O (Applicant here), entered into on April 8, 2003 (the "Settlement Agreement"), and which provided, *inter alia* "Big O shall have the exclusive rights to use the mark 'Big Foot' for: . . . 'vehicle replacement parts'." *See* Settlement Agreement, attached hereto as Exhibit B.

#### B. Background of Opposition

On February 17, 2004, Applicant filed an application, no. 76/576,412, for the mark BIG FOOT in connection with batteries.

On July 20, 2005, Opposer filed a notice of opposition against Big O's BIG FOOT application on the basis that the "mark sought to be registered by Applicant and the mark of Opposer are substantially identical, and their concurrent use of the related goods set forth in the application serail number 76/576,412 (batteries) and goods and services of Opposer is likely to cause confusion, or to cause mistake, or to deceive the purchasing public, to the damage of Opposer." *See* Notice of Opposition, ¶6.

Proceedings were instituted with the Board's July 30, 2005 order.

On September 8, 2005, Applicant filed Applicant's Motion to Amend Application wherein Applicant seeks to amend the application's identification of goods from "batteries" to "vehicle batteries."

#### II. ARGUMENT

Bigfoot 4x4 seeks to oppose Big O's BIG FOOT mark for vehicle batteries on the basis of a likelihood of confusion with Opposer's BIGFOOT marks. However, in light of the Settlement Agreement and entry of the Permanent Injunction, Bigfoot 4x4 fails to state a claim upon which relief may be granted; and the Notice should be dismissed.

Opposer has no standing to commence or maintain this action. The Lanham Act establishes a standing requirement. Section 13 states, in relevant part:

Any person who believes that he would be damaged by the registration of a mark upon the principal register... may... file an opposition in the Patent and Trademark Office, stating the grounds therefor....

See 15 U.S.C. §1063. Additionally, an "opposer must meet two judicially-created requirements in order to have standing – the opposer must have a 'real interest' in the proceedings and must have a 'reasonable' basis for his belief of damage." *Ritchie v. Simpson*, 50 U.S.P.Q.2d 1023, 1025 (Fed. Cir. 1999). See also TBMP §303.03 ("that it has a real interest in the case, that is a personal interest in the outcome of the proceeding"). Opposer failed to allege facts sufficient to plead either element.

Bigfoot 4x4 has neither a real interest in the proceeding nor a reasonable basis for belief in its claimed damage. The Court has ruled, in a final, non-appealable decision, that Applicant is the **exclusive** owner of the BIG FOOT mark for vehicle replacement parts. Indeed, Opposer Bigfoot 4x4 is under Court injunction to refrain from using the BIG FOOT mark in connection with such goods. Bigfoot 4x4 also has expressly agreed that "Big O shall have the exclusive rights to use the mark 'Big Foot' for: . . . 'vehicle replacement parts'." *See* Exhibit B, ¶2(g). Since the opposed application is for the BIG FOOT mark in connection with vehicle batteries, it falls squarely within the parameters of Big O's "exclusive rights" set forth in the Court's Permanent Injunction (and in the parties' Settlement Agreement).

Therefore, Bigfoot 4x4 cannot be harmed by Big O's use and/or registration of the opposed BIG FOOT mark – especially when Bigfoot 4x4 expressly agreed that Big O may "exclusively" use this precise mark. Accordingly, Opposer lacks standing. *See Midland Intern Corp. v. Midland* 

Cooperatives, Inc., 434 F.2d 1399, 168 USPQ 107 (CCPA 1970) (affirming Board's dismissal of Opposition for lack of standing in light of prior court determination).

By virtue of these same circumstances, Bigfoot 4x4 is also precluded, under principles of both res judicata and collateral estoppel, from bringing and maintaining the present Opposition. In federal district court litigation between these identical parties, a final judgment was entered, determining that Applicant Big O has the exclusive rights in the BIG FOOT mark vis-a-vis Bigfoot 4x4 for all "vehicle replacement parts" – including vehicle batteries. "If a court decides that a person either has or does not have the exclusive right to use of a mark, it is difficult to see how this determination can be anything less than conclusive of the right to federal regulation." MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §32:94 (4th ed. 2005). See also Squirrel Brand Co. v. Barnard Nut Co., 101 USPO 340 (Comm'r 1967) ("Simply stated, if the Court concludes that this defendant (applicant) has the right to use its mark in commerce, it has a right to register....") (parenthetical text in original); *Midland International Corp.*, 168 USPQ, at 110 ("The parties hereto, as was the board, are bound by, and we must respect, the efficacy of that [prior court] decision..."); Tuvache, Inc. v. Emilio Pucci Perfumes Intern., Inc., 263, F. Supp. 104, 152 USPQ 574 (S.D.N.Y. 1967) ("The Court, in the civil action, will necessarily determine this preliminary question of the right to use, and that determination will form the basis of the ultimate finding of the Office.")

Accordingly, the present opposition should be dismissed with prejudice.

#### III. SUSPENSION

Applicant understands that as of the filing of this Motion, the proceeding is suspended. *See* 37 C.F.R. §2.127(d). To the extent that Applicant is incorrect, it respectfully requests that the Board suspend proceedings pending disposition of this dispositive motion.

In view of the foregoing, Applicant prays that the Board GRANT Applicant's Motion to Dismiss, and dismiss Opposer's Notice of Opposition with prejudice.

Respectfully submitted,

BIG O TIRES, INC.

By:

Marsha G. Gentner Matthew J. Cuccias JACOBSON HOLMAN, PLLC 400 Seventh Street, N.W. Washington, D.C. 20004

Skery S. Harris

(202) 638-6666

September 8, 2005

Attorneys for Applicant

#### **CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of September, 2005, a true copy of the foregoing Applicant's Motion to Dismiss, or in the alternative, Motion for Judgment on the Pleadings was served by first-class mail, postage prepaid, upon counsel for Applicant:

Nelson D. Nolte, Esquire Polster, Lieder, Woodruff & Lucchesi, LC 12412 Powerscourt Drive, Suite 200

St. Louis, Missouri 63131

# **EXHIBIT A**

BIGFOOT 4x4, INC.,

Opposer,

VS.

BIG O TIRES, INC.,

Applicant.

Opposition No. 91166074

APPLICANT'S MOTION TO AMEND APPLICATION

FILED
United States District Court
Denver, Colorado

JAN 212004

GREGORY C. LANGHAM

#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO Lewis T. Babcock, Chief Judge

Civil Action No. 01-B-349

BIG O TIRES, INC.,

Plaintiff.

Defendants.

v.

BIGFOOT 4X4, INC. and VULCAN CHAIN AND WEBBING PRODUCTS, INC.

### FINAL ORDER AND PERMANENT INJUNCTION ON CONSENT

THE COURT, being duly advised in the premises and after reviewing Plaintiff's Motion to Enforce Settlement Agreement, Defendant Bigfoot 4x4, Inc.'s Confession of Motion to Enforce Settlement Agreement and Plaintiff's Reply to Defendant Bigfoot 4x4's Confession of Motion to Enforce Settlement hereby ORDERS, ADJUDGES and DECREES the following:

- 1. This Court has jurisdiction of the subject matter of the claims asserted herein and the above-named parties to this action.
- 2. Plaintiff Big O is the owner of the trademark BIG FOOT, as well as the design of a "Bigfoot" or Sasquatch character, as exemplified by Exhibit A, hereto, and the design of a "big foot", as exemplified by Exhibit B, hereto, in connection with the following items for vehicles: tires, wheels, tire accessories, wheel accessories, cargo restraints, shock absorbers, struts, suspension parts, and vehicle replacement parts [hereafter, collectively referred to as the "Big O BIG FOOT Mark(s)"], and the U.S. registrations therefor, nos. 1,102,058: 1,102,059; 1,904,955; and 2,314,775 [hereafter, the "Big O BIG FOOT Registrations"]

- 3. Each of the Big O BIG FOOT Registrations is good and valid in law.
- 4. Defendant Bigfoot 4x4, Inc., and the directors, officers, agents, employees and all other persons acting on behalf of, or in concert with, Bigfoot 4x4, Inc. and who have notice of this injunction, are hereby permanently enjoined from applying, or authorizing or licensing another to apply, the trademark BIG FOOT (alone or in conjunction with any other word, design or symbol, and whether as one word or two) to, and/or from using BIG FOOT (alone or in conjunction with any other word, design or symbol, and whether as one word or two) as a trade name, trademark or service mark for, and/or in connection with, any of the following items for vehicles:
  - a. tires;
  - b. wheels;
  - c. shock absorbers, struts and/or suspension parts;
  - d. tire accessories;
  - e. wheel accessories;
  - f. cargo restraints; and
  - g. vehicle replacement parts.
- 5. A use of the BIG FOOT mark (as one word or two) which is in violation of this injunction infringes the rights of Big O in the Big O BIG FOOT Mark(s).
- 6. The bond of \$1,500,000 posted by Big O in this action in connection with the preliminary injunction entered by the Court is hereby released, in full, to Big O and/or its surery, and Big O shall have no further obligation or liability for, and/or with respect to, such bond, vis-

a-vis the Court or Bigfoot 4x4, Inc., and Bigfoot 4x4, Inc. shall have no right, title or claim with respect to that bond and/or the proceeds of that bond.

7. All remaining matters at issue between Big O and Bigfoot 4x4, Inc. shall be, and hereby are, dismissed, the parties to pay their own costs and attorneys fees.

Dated: January 20

2007, in Denver, Colorado

BY THE COURT

wis T. Babcock, Chief Judge

WHITE STATES THE COURT

W31304

GREGORY & LINGHAM

#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO CERTIFICATE OF SERVICE

Civil Case No. 01-F-349 (BNB)

The undersigned certifies that a copy of the foregoing Final Order and Permanent Injunction on Consent was served on January \_\_\_\_\_\_, 2004, by:

(X) delivery to:

Jane Michaels, Esq.
Timothy P. Getzoff, Esq.
Holland & Hart
D. C. Box 6

Magistrate Judge Boyd N. Boland

(X) depositing the same in the U.S. Mail, postage prepaid, addressed to:

Kimberly A. Bruetsch, Esq. Harold R. Bruno, III, Esq. Stephen L. Waters, Esq. Richard D. Judd, Esq. Robinson Waters & O'Dorisio, P.C. 1099 18th Street, Suite 2600 Denver, CO 80202

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Don D. Jacobson, Esq. Charles H. Jacobs, Esq. Lohf Shaiman Jacobs & Hyman, P.C. 950 S. Cherry Street, Suite 900 Denver, CO 80246

GREGORY C. LANGHAM, CLERK

y: //////
Deputy Clerk/Secretary

# **EXHIBIT B**

BIGFOOT 4x4, INC.,

Opposer,

VS.

BIG O TIRES, INC.,

Applicant.

Opposition No. 91166074

APPLICANT'S MOTION TO AMEND APPLICATION

gfoot shall have the exclusive rights to use the mark "Bigfoot" for:

- a. monster trucks (defined as vehicles with tires equal to or greater than 48 inches;
- b. depictions of monster trucks or with tires disproportionally large in reference to the vehicle body, except as permitted in paragraph 3d; RECEIVED
- c. toys, except as permitted in paragraph 3a, below;
- d. clothing, except as permitted in paragraph 3b, below;

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entertainment services:

- f. paper goods, except as permitted in paragraph 3b, below;
- g. sponsorships, but not to include licensing of the Bigfoot mark for, or use of the Bigfoot mark on the goods listed in paragraph 2. Exclusivity of Bigfoot 4x4 for sponsorships applies only to the Bigfoot mark and does not prohibit Big O sponsorships under the Big O name, or any other mark, other tan Bigfoot, in general. If Big o should enter into a sponsorship, Big O may display Bigfoot products as enumerated under paragraph 2 and may provide promotional or advertising materials or displays provided that one of the identifiers included in paragraph 3b is associated with such use;
- h. monster truck conversion kits and components; and
- I. audio / visual except as permitted in paragraph 3.
- 2. Big O shall have the exclusive rights to use the mark "Big Foot" for:
  - a. tires:
  - b. wheels:
  - shock absorbers, struts and/or suspension parts;
  - d. tire accessories;
  - e. wheel accessories:
  - f. cargo restraints;
  - g. "vehicle replacement parts"; and
- 3. Big O may also use the BIG FOOT mark as follows:
  - a. In connection with tour salety and the salety an

# BIGFOOT 4X4, INC.

6311 N. Lindbergh Blvd. Hazelwood, MO 63042-2876

Phone (314) 731-8112 bigfoot@bigfoot4x4.com

Fax (314)731-8114

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Bigfoot shall have the exclusive rights to use the mark "Bigfoot" for:

- a. monster trucks (defined as vehicles with tires equal to or greater than 48 inches;
- b. depictions of monster trucks or with tires disproportionally large in reference to the vehicle body, except as permitted in paragraph 3d;
- c. toys, except as permitted in paragraph 3a, below;
- d. clothing, except as permitted in paragraph 3b, below;
- e. entertainment services;
- f. paper goods, except as permitted in paragraph 3b, below;
- g. sponsorships, but not to include licensing of the Bigfoot mark for, or use of the Bigfoot mark on the goods listed in paragraph 2. Exclusivity of Bigfoot 4x4 for sponsorships applies only to the Bigfoot mark and does not prohibit Big O sponsorships under the Big O name, or any other mark, other tan Bigfoot, in general. If Big o should enter into a sponsorship, Big O may display Bigfoot products as enumerated under paragraph 2 and may provide promotional or advertising materials or displays provided that one of the identifiers included in paragraph 3b is associated with such use;
- h. monster truck conversion kits and components; and
- i. audio / visual except as permitted in paragraph 3.
- 2. Big O shall have the exclusive rights to use the mark "Big Foot" for:
  - a. tires:
    - b. wheels:
    - c. shock absorbers, struts and/or suspension parts;
    - d. tire accessories:
    - e. wheel accessories;
    - f. cargo restraints;
    - g. "vehicle replacement parts"; and
- 3. Big O may also use the BIG FOOT mark as follows:
  - a. In connection with toys solely to advertise or promote products, stores and franchisees; however, even for advertising and promotions, Big O may not use

BIG FOOT in connection with toy vehicles;

- b. In connection with clothing or paper goods to advertise or promote Big O products, stores and franchises, provided that if Big O or its franchisees sell such products to retail customers, the BIG FOOT mark must be accompanied by (i) the BIG O name; (ii) the Big Foot Sasquatch character, (iii) Big O's "big foot" (footprint) design, or (iv) the word "tire" or "tires."
- c. In connection with audio / video, Big O has the exclusive right to use the Big Foot mark with regard to the exclusive products listed in paragraph 2. Big O agrees not to use or depict a monster truck (as defined in paragraph 1a) nor use the Bigfoot mark on the vehicle, in such a medium.
  - d. Big O may advertise its tires, where such advertising shows disproportionally large tires in relation to the vehicle body, provided that such portrayal is consistent with the exceptions provided in this paragraph 3.
- 4. In all other allowed uses under this settlement agreement outside the parties exclusive domain, to the extent practicable, both parties agree they shall use the term "Bigfoot" or "Big Foot" in their respective marks together with the other terms of graphic representations; e.g., for Big O as set forth inparagraph3 and for Bigfoot, the monster truck theme; in order to differentiate their marks. Both parties shall also make their best efforts to have licensees and franchisees abide by this requirement to use other terms or graphic representations with their use of "BIG FOOT" or "BIGFOOT."
- 5. Mutual Release. The parties will execute a mutual release on behalf of themselves, their affiliates and related companies (e.g., parents, subsidiaries and assignees). The release will cover any and all claims which were raised or which could have been raised in the current litigation.

Mutual Indemnity. Each party will indemnify, hold the other harmless and defend the other from and against any and all claims brought by a party's affiliate or related entity, including franchisees and licensees, claiming trademark infringement or unfair competition or unfair trade practices based upon any activity permitted by the agreement. [The obligation to defend shall require the party indemnifying the other to pay the aggrieved parties attorneys' fees and costs for counsel of the aggrieved party's choosing.]

6. The following terms will govern any future dispute regarding trademark use between Bigfoot and Big O or either of them and any person or entity using a mark as a licensee of the other;

In the event that Big O or Bigfoot believes that the other has acted in a manner which infringes on its rights under its registered mark or under any claimed common or state law mark, or under any registration or common law or similar right outside the territorial United States of America, the aggrieved party shall notify the other in writing, setting forth the claim of infringement. Within 10 business days of receipt of such notice, the receiving party shall respond thereto, and the parties

shall schedule one or more meetings, which may be held by telephone or other electronic means, during the succeeding 10 business days.

If the parties are unable to resolve the dispute by the end of the 20 business day period described above, within 10 calendar days thereafter they may agree upon the appointment of one mediator who shall assist them in the further attempts to resolve the dispute. In the event that the parties do not agree to mediate, or fail to appoint a mediator within the time allotted, or the mediation is unsuccessful, either party may assert any and all rights which it may claim in any proper forum. No argument of laches or delay based on following this procedure. It is agreed that mediation is voluntary.

#### **OTHER MATTERS:**

- 1. With regard to Firestone's sponsorship of an exclusive monster truck, Bigfoot 4x4 agrees:
  - A) With regard to monster truck(s), to add the term '4x4' to any and all uses of the mark Bigfoot (one word or two);
  - B) With regard to semi-tractor and or trailer use, to add the term '4x4' to any and all uses of the mark Bigfoot (one word or two) and a depiction of a monster truck;
  - C) In all cases the size of the lettering shall be of comparable size and depiction of the monster truck shall be large enough to be readily visible;
  - D) Such modifications to the vehicles shall be completed no later than 30 days after the execution of a final settlement agreement between the parties but in no event any later than \_\_\_\_\_\_
- 2. Big O will not challenge the existence and operation of the existing BIG FOOT retail store (such single store can continue to sell all of those types of items previously sold in the store), or up to ten (10) additional locations (not limited to St. Louis) so long as it is not within a Big O franchisee's exclusive territory. In the event that the alternate site(s) precedes development of a franchise territory by Big O than the Bigfoot 4x4 retail location will not be required to relocate by Big O at such time as a franchised location is developed. Big O agrees that it will not develop a Big O franchise within 2 miles of one of these ten (10) locations provided notice of the location is made to Big O on a timely basis.
  - Bigfoot 4x4 may open as many novelty and accessory stores as it determines. Such stores will not market the items listed in paragraph 2 unless pursuant to a Big O franchise agreement.
- 3. Big O has the right to open and operate Big O franchises or company owned retail stores in and around the St. Louis MSA. So long as Big Foot 4x4 maintains the Missouri mark 'Home of Bigfoot' Big O agrees to provide a disclaimer in the St. Louis MSA, such as 'Home of Bigfoot TIRES' [emphasis added].
- 4. Injunction directed to Big Foot 4x4 but only after Bigfoot 4x4 settlement with Vulcan.
- 5. Bigfoot 4x4 shall provide retail and wholesale pricing of a three-year monster truck display program to Big O for its consideration. If accepted Big O shall receive the wholesale pricing of such program. It is specifically noted that such vehicle would be used as an identified as a Big O monster truck.

- 6. To reduce its ultimate cost to settle litigation, Vulcan may have a reasonable sell off period to sell off existing inventory of about \$250,000 without packaging, so long as not directly or indirectly sold in retall channels (i.e. fleet sales) if, and only if, this is used to obtain Vulcan's agreement to a settlement payment of an amount of at least \$250,000.
- 7. Bigfoot 4x4 settlement with Vulcan is a condition precedent to executing the final settlement agreement between the parties pursuant to the terms outlined above.